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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY CHARLES WILKS,

Defendant and Appellant.

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H026559

(Santa Clara County Superior Court No. CC123769)

Defendant was convicted by jury trial of three counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)) and six counts of receiving or selling stolen property (Pen. Code, § 496, subd. (a)). He admitted that he had suffered two prior serious felony convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and served prison terms for two prior felony convictions (Pen. Code, § 667.5, subd. (b)). The court committed defendant to state prison for a term of 25 years to life consecutive to a two-year term. On appeal, he claims that the judgment should be reversed because (1) the trial judge made some prejudicial comments during voir dire, (2) two charts created by a witness were admitted at trial, (3) evidence of uncharged thefts was admitted, (4) the trial court permitted the jury to determine whether a witness was an

expert and (5) the restitution amount was excessive. We conclude that the trial court's comments during voir dire were so prejudicial that reversal is required.[1]

I. Factual and Procedural Background

Defendant was employed by a temporary agency that assigned him to work at Cisco Systems beginning in January 2001. Access to Cisco buildings could be obtained only by use of a card key. Each card key was assigned to a specific person. Cisco provided defendant with a card key that gave him access to all Cisco office buildings. Cisco retained records of every access to each of its buildings and the identity of the person making access. It also had video cameras that recorded each entry.

In March 2001, IBM and Toshiba laptop computers began disappearing from Buildings 5, 6 and 7 of Cisco's office complex. These buildings are adjacent to one another. More than 20 laptops were reported missing from Buildings 5, 6 and 7 in March and early April. Access records showed that defendant had entered each of the buildings during the time periods of each of the thefts. Defendant had frequently accessed Buildings 5, 6 and 7 "on the days or nights that the thefts occurred" in them. Many of defendant's entries into these buildings were late in the evening or in the wee hours of the morning. Video of defendant's entries showed that he was always carrying a "laptop bag" and one or more large duffel-type gym bags. Defendant worked in a Cisco building that was three miles away from Buildings 5, 6 and 7, and he had no Cisco business in those buildings. However, Building 6 housed a gym that was open to all Cisco workers.

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[1] Consequently, we do not reach defendant's assertions of evidentiary, instructional and sentencing error. None of these issues are ones that require guidance in the event of retrial.

On April 5, Wendel Marques, a Cisco loss prevention investigator, contacted defendant about the missing laptops. Marques observed that one of the stolen laptops was in defendant's possession. Marques contacted the police, and defendant was arrested. After defendant's arrest, the laptop thefts from Cisco stopped.

At the time of his arrest, defendant had $7,000 in cash in his possession. He also had a key. Further investigation revealed that the key fit the lock of a vacant office in an unused wing of Building 6. Defendant's bank records showed that, between March 27 and March 30, he had deposited $2,000 and withdrawn $6,800. On March 10, defendant had arranged to purchase an expensive motorcycle. He had placed a deposit of $7,300 on the motorcycle, and a balance of $6,579 remained due.

In late March and early April, defendant sold laptops to two of his acquaintances. One of these acquaintances tried to sell two laptops on E-Bay. A Cisco employee noticed the laptop because of the specialized Cisco configuration and contacted the police. The police recovered all but one of the laptops from the acquaintances.

Defendant was charged by information with four counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)) and six counts of possessing or selling stolen property (Pen. Code, § 496, subd. (a)). It was further alleged that he had suffered two prior serious felony convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and served prison terms for two prior felony convictions (Pen. Code, § 667.5, subd. (b)). The prior conviction and prison prior allegations were bifurcated, and defendant subsequently admitted them.

Defendant testified on his own behalf at trial. He acknowledged that he had been working in Cisco's shipping and receiving department, and he admitted that the access records were accurate. Defendant attempted to provide innocent explanations for his entries into Buildings 5, 6 and 7. First, defendant explained that, because he had no place to live, he was surreptitiously residing in an unoccupied office in a vacant

portion of Building 6. His late evening entries to Building 6 were common because that was when he arrived each evening after attending his vocational classes.[2]

Second, he asserted that he had repeatedly entered Buildings 5 and 7 at times because he was trying to avoid being found living in Building 6 when Cisco people were "changing work stations," "moving furniture" and "doing janitorial services and that type of thing" in Building 6 late at night and in the wee hours of the morning. Defendant therefore "decided to get out of the building and try to go somewhere and wait until the crowd died down." Defendant claimed that he went into Buildings 5 and 7 while he was waiting. Third, defendant claimed that he had entered Building 7 on other occasions to stay dry when it was raining while he was waiting for a bus to arrive outside Building 7.

Defendant claimed that he had enough money to buy the motorcycle because he had saved almost all of his earnings, including the $6500 he made while working at Cisco. He had acquired the laptop found in his possession in mid-March for $850 from Vincent Ramos, a co-worker in Cisco's shipping and receiving department. Defendant denied taking any laptops from Cisco, selling any laptops to anyone or possessing any laptops with knowledge that they were stolen. Defendant claimed that his acquaintances had admired the laptop that defendant had purchased from Ramos, and defendant had then arranged for Ramos to meet one of the acquaintances. Defendant admitted that he had suffered two prior convictions for robbery and one prior conviction for felony petty theft. On cross-examination, defendant admitted that he had sold a Hewlett Packard laptop to one of his acquaintances for $1100.

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[2] Although defendant testified that he utilized the Building 6 gym nearly every day, this did not explain his late night entries into Building 6 because he testified that he used the gym in the morning before work from 5:30 a.m. to 7:00 a.m., and the gym closed at 9:30 p.m.

Defendant claimed that he had acquired the Hewlett Packard laptop from his brother as a Christmas gift.

Ramos testified at trial that he did not know defendant's acquaintance and had never sold any laptops to him or to defendant. The acquaintance testified at trial that he did not know Ramos. Ramos had sold an old laptop in late March to someone defendant knew from school, but this person was not the acquaintance in question. Ramos denied taking any laptops from Cisco, and access records showed that Ramos had not accessed Buildings 5, 6 and 7 during the time periods when the laptops had disappeared.

Defendant's trial counsel argued to the jury, among other things, that defendant had reasons for entering Building 6 that were "not suspicious" since he was living there. He suggested that defendant would not be guilty of burglary if he had formed the intent to steal after he entered a building for a legitimate reason.

After a few hours of deliberations, the jury acquitted defendant of the burglary count regarding Building 6 but convicted him of all of the other counts. The court exercised its discretion to strike the prior conviction findings as to all but one of the counts. It imposed a term of 25 years to life on the remaining count and stayed pursuant to Penal Code section 654 the sentences for the other counts. It also imposed a two-year term for the prison priors. The court ordered defendant to pay $85,000 in restitution to Cisco and a $5400 restitution fund fine. Defendant filed a timely notice of appeal.

II. Discussion

Defendant asserts that the trial judge prejudicially erred in making comments during voir dire that tended to prejudice the prospective jurors against him.

A. Background

Voir dire began on the morning of March 19, 2003. Late that afternoon, half an hour before the court recessed, the trial judge questioned a prospective juror about her occupation. The prospective juror explained that she was a retired "director of materials for several high-tech companies." The judge asked her if Cisco, E-Bay or Heald College had been among her "customers." She disclosed that Cisco was "one of our customers." The judge asked her a number of other questions and then inquired whether "theft" had "ever touched your life so you could not be fair and impartial?" The prospective juror said: "Well, it's touched my life but I don't know if it would affect my partiality, some people might think, but when I was director of materials I had a responsibility for shipping and receiving in the warehouse and we had laptops stolen, so that was under my purview."

The judge then made the following comment: "Do you want to know why. Because most of the people you hire are just out of prison. No, that's our experience, no disrespect. That's our experience in this system, most people in shipping and receiving they don't do background checks and so what happens, you know, that stuff disappears quicker than you can get it out on the dock." The prospective juror replied: "We did background checks." The judge retorted "[n]ot the way we can do them," and the prospective juror conceded "Probably not." After a couple of more questions, the judge excused the prospective juror, apparently for cause.

First thing the next morning, the defense moved for a mistrial based on the judge's comments to this prospective juror. Defendant's trial counsel described the comments, and explained that his "concern" was "that Mr. Wilks' situation is that he did, in fact, work in the shipping-receiving department of Cisco Systems. And I can represent that he will testify, and at least two -- at least three of his prison felony convictions will be allowed to come in to impeach him." "[T]here's a fair inference the jury's going to think, 'how did this guy get a job at Cisco shipping and receiving if

he has this type of felony record and the charges are that he stole?' [¶] And my concern is that the court's position carries a great deal of weight with the jurors. And the comment that these types of individuals can't be trusted, I think the jury may make a connection between Mr. Wilks, and the people that I think that were the subject of the discussions between this juror and the court."

The prosecutor agreed with the defense that there was "a possibility of prejudice." "I would hope we wouldn't have to request a new venire but you could give an instruction to -- rather an instruction to the jurors not to take anything you say as evidence and to admonish them nothing you say or opinions you give have anything to do with the facts of this case and they should not consider them as such. I think that remedy probably would be sufficient. [¶] But if the court felt that we needed to request a new venire and start all over, that would be appropriate at this point since we've not sworn the panel." Defendant's trial counsel interjected that he was requesting that "we begin anew."

The judge admitted his "lapse in judgment," but he denied the mistrial motion. Instead he proposed to instruct the jury "that whatever I said yesterday regarding merchandise that's taken by people recently released from custody is not facts, is not evidence in this case, and that the jury is ordered to disregard it, that the court has just based an opinion based upon past experience and it has nothing to do with this case and they're ordered to disregard it, not consider it." The judge believed that such an admonition would "cure" any harm from its comments. However, both the prosecutor and defendant's trial counsel asked the judge to give "a more general admonition" so as "not to draw attention" to the court's "specific" comments. The judge agreed to do so.

The judge then gave the following instruction to the prospective jurors. "Ladies and gentlemen, during the course of jury selection sometimes the courts or the judge may make statements or observations during jury selection. [¶] And I just wanted to

emphasize: Anything I say, any opinion I might render during jury selection is not evidence and is not to be considered by you for any purpose at all. [¶] Sometimes in jury selection process the court may make a statement or a comment that has nothing to do with the case and sometimes it can be taken by jurors as possibly evidence of something. [¶] And please, anything I say in this case is not evidence and you're to disregard it because I have no opinion one way or the other about the evidence in the case because like you, I don't know what it is. I haven't heard anything about it." Voir dire then continued, and a jury had been selected and sworn before noon.

A few days later, before opening statements, defendant's trial counsel sought, under Evidence Code section 352, to preclude the prosecution from using defendant's prior convictions to impeach him when he testified because the jury might link the judge's voir dire comments and defendant's prior convictions and conclude thereby that defendant was guilty. The judge denied the request.

After closing arguments, the judge again instructed the jury to ignore any comments it had made. "I have not intended by anything I have said or done, or by any questions that I have asked or any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusions."

B. Analysis

Defendant argues that the judge's comments require reversal because these comments either revealed that the judge was biased against defendant or prejudiced the jury against defendant. That these comments were highly inappropriate cannot be questioned. The prosecutor joined defendant's trial counsel in so asserting, and we agree. The only question is whether these comments were so prejudicial that reversal

of the judgment is required.[3] We conclude that reversal is required because these comments were incurably prejudicial and no admonition could possibly wipe them from the prospective jurors' minds.

We normally accord deference to a trial court's implied finding, incident to its denial of a mistrial motion, that an error is not incurably prejudicial. (*People* v. *Wharton* (1991) 53 Cal.3d 522, 565.) The trial court's denial of a mistrial is then subject to review only for abuse of discretion. But where the error in question is biased comments by the trial judge, it is inappropriate to defer to the trial court's finding and we must independently assess whether the comments were incurably prejudicial. And, while it is usually assumed that a jury will heed an admonition, this assumption is inapt where exceptional circumstances make it improbable that the jury will obey the admonition. (*People v. Gould* (1960) 54 Cal.2d 621, 627-628.)

Here, we can only conclude that the trial judge's comments were incurably prejudicial as they were so exceptional that no juror could be expected to heed an admonition to disregard them. The judge told the jurors that "most people in shipping and receiving" are "just out of prison" and are necessarily prone to stealing their employer's property. After hearing the judge's comments, the jurors heard evidence at trial that defendant worked in Cisco's shipping and receiving department, had suffered prior convictions for robbery and theft and was accused of taking Cisco's property.

No rational juror could have avoided connecting this evidence with the trial judge's comments and concluding that the judge was convinced of defendant's guilt. And the emphatic tenor of the judge's comments to the prospective juror only

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[3] Defendant contends that the court's comments amounted to per se reversible error or federal constitutional error that is reversible unless the error was harmless beyond a reasonable doubt. As we conclude that reversal is required because the court's comments were incurably prejudicial and could not be cured by admonition, it is not necessary for us to consider these contentions.

heightened the likelihood that the jurors would be influenced by the judge's remarks. Indeed, it would defy common sense to imagine that these jurors would not be influenced by the judge's comments when they subsequently learned that his characterization of shipping and receiving employees with criminal records as thieves appeared to be a precise description of defendant.

Such inflammatory remarks cannot be wiped away by an admonition. When a trial judge tells the jurors that he is convinced of the defendant's guilt, the impression is indelible. The fact that the comments were made during an emphatic exchange with a prospective juror does not minimize their prejudicial nature. In fact, the trial judge's insistence on his point of view during that exchange strengthened the impression that the judge's belief in defendant's guilt was entitled to greater value than that of a prospective juror. Such an impression so undermined the role of the jurors in determining defendant's guilt that we cannot have any confidence in their determination. Consequently, we conclude that the trial court should have granted the mistrial motion, and its failure to do so requires reversal of the judgment.

III. Disposition

The judgment is reversed.

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Mihara, J.

WE CONCUR:

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Rushing, P.J.

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Premo, J.